



February 2009 Newsletter

MANAGING INFORMATION IN WHITE COLLAR CRIMINAL DEFENSE MATTERS


There is probably no area of law where it is more critical to have the best representation and access to necessary resources than white collar criminal defense. In these cases, more than money is on the line – defendants may be facing actual jail time and criminal verdicts that can alter their lives forever. Ironically, although the scale, complexity and impact of these cases can meet or exceed civil litigation, budgetary constraints often preclude defendants from working with their lawyers to obtain the most effective defense. The way the information is produced poses a unique challenge: early on, the government may dump hundreds of thousands – or even millions – of pages of documents on the defense.

DOAR has handled many of the most prominent white collar criminal defense cases in the nation (see sidebar). Over the course of our experience with such litigation, we have seen that having the stamina and budget to make it to – and through – trial is imperative. Because these cases are so complex and document-intensive, trial strategy can be significantly enhanced by the use of jury research (focus groups and mock trials), and by presenting the case using graphics and technology.

Moreover, because of the type of documents involved in these cases, and the way they are produced, managing information effectively is of paramount importance. As this information typically consists of document collections received by the government from third parties, the government, in the interest of full-disclosure and cooperation, most often just turns them over in the form in which they were provided, without any effort to narrow them down to what is potentially relevant. Therefore, the defense is faced with the daunting task of trying to separate the wheat from the chaff. In the remainder of this article, we offer our perspective on how some of the challenges relating to information management can be met.


Meet & Confer

We have found that opening a dialog with the government prior to receiving discovery, as you would (or should) in civil litigation, allows you to develop the most cost-effective, efficient process for dealing with the government's production. You may be able to work with the government and its representatives to help ensure that you receive only what you agree is particularly relevant. Alternatively, you may be able to go directly to the source of the production to get a better



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A Selection of DOAR's White Collar Criminal Case Experience:

- *United States v. John Rigas, et al. (Adelphia Communications)*
- *United States v. Martha Stewart, et al.*
- *People of New York v. Greg Doherty, et al. (Marsh McLennan)*
- *United States v. Wesley Snipes*
- *United States v. Michael Resnick, et al. (Royal Ahold)*
- *United States v. Sanjay Kumar, et al. (Computer Associates)*

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sense of what was produced, or receive more information than the government would otherwise have provided.

Furthermore, the government is usually willing to share its analysis of what it has – at least in the form of an inventory indicating where the information was obtained – but you have to ask. Information collected during a government seizure of evidence, for example, is usually well documented, as forensic investigators maintain logs and chain-of-custody forms. This data is often put through a file-level inventory that, if provided, gives the defense a roadmap of the data to facilitate a more technical discussion with the government regarding prioritization and form of production.

As mentioned above, many productions by the government are simply regurgitations of what it received from companies that produced the information in response to subpoenas or Wells notices. This information may be produced in a number of formats, including image (TIFF or PDF) or native files. These formats can present technical and financial dilemmas, because they may not include searchable text or metadata (data about the data) that would allow you to more effectively analyze and filter the productions.

Indeed, the most common form of production, based on our receipt of hundreds of millions of pages of documents in these types of cases, is TIFF with full text files (usually from optical character recognition or OCR), even though the evidence itself is predominantly email files and their attachments. While this format can be useful, receiving the original, native files, which include the metadata, is far more useful. As middle ground, TIFF files, with full text and designated fields of metadata can suffice. In at least two large, high-profile cases, we were able to persuade the government to go back to the producing party and request a supplemental production of metadata. Even though the government may not have specifically requested metadata, the defense should be entitled to receive it as the metadata is part and parcel of the document that was produced and the government should require its production.



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Data Mining & Analytics Systems Used by DOAR:

- *Clearwell Systems*
(www.clearwellsystems.com)
- *Inference Data*
(www.inferencedata.com)
- *Stratify*
(www.stratify.com)

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Use of Keyword Filters

As any practitioner who has been involved in civil litigation that includes the production of electronic evidence will know, the use of search terms is a key component of culling information down to what is arguably relevant. The use of search filters is even more advisable in criminal defense matters as the defense team is usually intimately familiar with the issues and can work with their clients to craft search terms and phrases that get to the heart of the government's allegations and the defense's strategy.

Once the information is loaded and indexed into a capable system, search results can be generated in minutes if not seconds. A sample of the results should be reviewed with the defense team to verify the legitimacy of the terms and refine them as needed to return the most relevant information and, as importantly, reduce the amount of irrelevant information returned as false positives. The resultant set of documents can then be loaded into a document management system for use by the defense team. In our experience, the average responsiveness rate of what is responsive to the terms is 20% to 30% – meaning 70% to 80% of what is produced is wholly irrelevant to the heart of the case. The key to reliable results is close collaboration between those applying the terms and the defense team members' review of the results.

Data Mining & Analytics

There are a few analytical systems (see sidebar) that, when combined with the requisite expertise and methodology, are extremely valuable to a substantive analysis of large volumes of information such as those produced by the government. Essentially, these systems allow you to apply search terms as discussed above – but go several steps further by conceptually grouping documents in a way that is not totally dependent on finding search terms within them.

Such systems are capable of returning conceptually similar documents: documents that are like the documents that are responsive to the search terms but do not include any of the search terms. Using this technology can, for example, enable the



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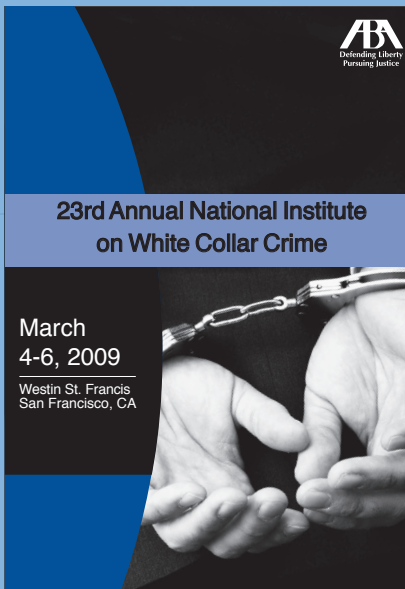
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defense to take documents designated by the government during trial and instantly find conceptually similar documents that can be incorporated during cross examination. Given the sheer number of documents, it is unlikely that the government has reviewed the vast majority of them, or uncovered similar documents that may shed more light on an issue in a way that is beneficial to the defense. For instance, a document that the government feels demonstrates knowledge by the defendant of fraudulent activities at his or her company can be conceptually compared to the larger universe of documents to demonstrate that the defendant was only occasionally copied, and not one of those who communicated frequently about the alleged fraud.

Conversely, categories of irrelevant documents can be identified and removed, even if those documents were responsive to one or more search terms. Employing a methodology that incorporates analytics has resulted in an average reduction of 80% to 90% of the document population. While retaining experts and using data analytics are more expensive than traditional filtering techniques, the reduction of the time and cost associated with reviewing documents in a linear fashion more than provides for an easy return-on-investment calculus.

Criminal defense lawyers often feel that they have only two options when it comes to reviewing large document productions in white collar criminal cases – scratch the surface of the document collection or spend hundreds of thousands of dollars to review the documents. Opening a dialog with the government and using search filters and data analytics provide for a middle ground that can greatly enhance the defense's knowledge of what documents help or hurt their case.

For more information regarding DOAR's approach to managing white collar criminal defense matters, please visit us at www.DOAR.com or call us at 800.875.8705.



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